KUMAR SELVARAJ v. TIMBALAN MENTERI DALAM NEGERI, MALAYSIA & ORS

HIGH COURT MALAYA, PERAK
MUNIANDY KANNYAPPAN J
[JUDICIAL REVIEW NO: AB-25-3-05-2021]
6 OCTOBER 2022

Abstract – *A restriction order that emanates from a detention order, premised on a set of allegations of facts that does not correspond with the supreme law in art. 149 of the Federal Constitution, and is in non-compliance with the pith and substance of the Dangerous Drugs (Special Preventive Measures) Act 1985, ought to be judicially reviewed. The law demands that the information as to the involvement of the applicant, either alone or with a substantial body of persons when carrying out a drug trafficking activity, has to be furnished to him with certainty, clarity and preciseness; it cannot be a guesswork, surmise or conjecture.*

ADMINISTRATIVE LAW: *Judicial review – Application for – Application for judicial review of restriction order issued pursuant to s. 7(1) of Dangerous Drugs (Special Preventive Measures) Act 1985 ('Act') – Restriction order emanated from detention order – Whether detention order lawful and in accord with pith and substance of Act and art. 149 of Federal Constitution – Whether applicant's personal freedom and liberty deprived – Whether entire process of arrest, remand, detention, suspension and restriction illegal – Federal Constitution, arts. 5(1), 151(1)(a)*

PREVENTIVE DETENTION: *Restriction order – Restriction order issued pursuant to s. 7(1) of Dangerous Drugs (Special Preventive Measures) Act 1985 ('Act') – Restriction order emanated from detention order – Whether detention order lawful and in accord with pith and substance of Act and art. 149 of Federal Constitution – Whether applicant's personal freedom and liberty deprived – Whether entire process of arrest, remand, detention, suspension and restriction illegal – Whether judicial review of restriction order ought to be allowed*

The applicant applied for judicial review of a restriction order issued against him pursuant to s. 7(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('Act'). The restriction order emanated from a detention order issued against him by the first respondent, Deputy Minister of Home Affairs ('DM') pursuant to s. 6(1) of the Act. The applicant alleged that his detention had been unlawful, as it was not in accord with the pith and substance of the Act and art. 149 of the Federal Constitution ('FC'). As the detention order followed by an order of restriction with conditions was the pivotal scenario in the case of the applicant, an issue was raised as to the lawfulness of the detention order made against the applicant. It was contended that the detention, which was premised on a set of allegations of

A facts, did not correspond with the supreme law in art. 149 of the FC, whereby the applicant may be detained only if he was involved or connected with a substantial body of persons. To support judicial review of preventive detention by the respondents, the applicant's primary contention was that the applicant was alleged only to have been involved alone in the alleged drugs
B trafficking activity and not with other individuals, for the activity to constitute involving a substantial body of persons. Thus, his lone involvement under the law pursuant to the Act read together with art. 149(1) of the FC, did not trigger preventive detention, including issuance of firstly, a detention order, then suspended, followed by a restriction order pursuant
C to s. 7(1) of the Act. The respondents, in resisting the application for judicial review by the applicant, specifically by DM, it was apparent when issuing the said detention order he had categorically stated, the applicant was involved and connected with a substantial body of persons when he carried out the drugs trafficking activity.

D **Held (allowing application):**

(1) The applicant had been alleged to have been involved in drugs trafficking activity alone by buying and selling drugs as well as obtaining only the services of one other individual as his conduit to sell the said drugs. He was not out there to embark on a drugs trafficking enterprise
E or syndicate with a substantial body of persons. Merely obtaining services of another accomplice did not render his involvement with a substantial body of persons, as envisaged under the Act read together with art. 149(1) of the FC. He was alleged only to be involved alone and individually in the drugs trafficking activity, hence the use of 'kamu' and
F not 'dengan sekumpulan orang lain yang terlibat dalam pengedaran dadah'. The allegations of facts, on which the applicant had been detained, was the foundation for his preventive detention. As the said allegations were akin to a charge in an open court criminal trial, it has got to be specific, certain and precise. This was fortified by
G art. 151(1)(a) of the FC, which allowed him an unfettered right to be heard against his detention. (para 10)

(2) The applicant was initially arrested for self-administration of drugs and, without his knowledge, he was asked to sign on certain instruments given to him, which later he realised caused his detention under the Act
H for a period of 60 days. Thus, the applicant's arrest was for self-administration of drugs, when he was hauled up for a urine test to confirm self-administration of drugs. Magically, the said arrest pursuant to s. 15(1)(a) of the Dangerous Drugs Act 1952 culminated into a detention under the Act. Then, came about the allegations of facts
I against him, stating he was involved in drugs trafficking activity, not with a body of persons but alone. His case did not rest there, but after his legal representation to the Advisory Board for hearing, the detention order in its entirety was suspended and instead, a restriction order

followed against him with a myriad of conditions, to which he had claimed not only his liberty was seriously affected but he could not carry out any gainful activity to sustain his livelihood at the restricted place. Rightly so, his representation was allowed, in full reliance on the wordings of the allegations of facts furnished to the applicant by the first respondent. It was obvious, the applicant's involvement with drugs trafficking activity was by himself only, without any support or assistance from a substantial body of persons, in order to justify his detention under the Act. Hence, suspension of the detention order, later served with a restriction order, attendant to it, a myriad of supervision requirements pursuant to s. 7(1) of the Act. Hence, in entirety it was clear as crystal that his personal freedom and liberty had been deprived, thus transgressing art. 5(1) of the FC. That *per se*, rendered the entire process of arrest, remand, detention, suspension and restriction, illegal. (para 14)

(3) The DM, who had issued the detention order against him, had in his affidavit resisting the application for judicial review, deposed that the applicant was not alone when he committed the drug trafficking activities, but associated with other individuals, forming a substantial body of persons. Justification for his finding was purportedly premised on scrutiny and consideration of the investigation and inquiry report prepared and forwarded to him respectively by the investigation officer of the case as well as the inquiry officer. Despite reference and adherence to the said reports, it was not produced as exhibits because it was confidential and its disclosure was not permitted under s.14 of the Act. But for the sake of fairness, transparency and accountability, it would be appropriate for those reports to be produced, as it formed the basis for his contemporaneous consideration before arriving at a finding against the applicant. To comply with s. 14 of the Act, the DM could have redacted the confidential parts in those reports, which he considered to be against national interest, from being revealed and disclose parts of it which supported his finding, that the applicant had been involved with acts of trafficking dangerous drugs by associating or syndicating himself with a substantial body of persons. With the decision of the apex court in *Selva Vinayagam Sures v. TMDN Malaysian & Ors*, it was a legal requirement for him to make the relevant disclosure, thus not having to breach s. 14 of the Act. (paras 17 & 18)

(4) In order of time, the allegations of facts prevailed over the finding of the DM in his affidavit. The allegations of fact were served on the applicant much earlier in time, then came the finding by the DM in his affidavit, solely to resist the application by the applicant for judicial review. It is settled criminal jurisprudence, if there are two sets of facts constituting background to the detention order against the applicant, one for and

another against him, this court was without an alternative but to adhere to the former. Such inference was fortified by the apparent fact that liberty of the applicant was in jeopardy. Ensuing from that, the respondents were not able to demonstrate to this court that the applicant had been lawfully detained pursuant to the Act, promulgated under art. 149 of the FC. The law demands information as to involvement of the applicant, either alone or with a substantial body of persons, when carrying out the drug trafficking activity had to be furnished to him with certainty, clarity and preciseness. It shall not be guesswork, surmise or conjecture. There shall also not be incongruence between allegations of fact and finding by the DM as deposed in his affidavit, as both were against the applicant, and the DM was the constant factor, as he issued the detention order against the applicant. (paras 21 & 22)

(5) It is trite law, *certiorari* will lie to quash a decision made by the first respondent in excess or abuse of jurisdiction or contrary to the rules of natural justice or where there is an error of law on the face of his decision. By not complying with the pith and substance of the preamble to the Act which has to be read with art. 149(1) of the FC, the detention order issued against the applicant was null and void. Thus, stemming from its root which was illegal, *vires* of its illegality followed, when the said detention order was suspended and a restriction order had been issued against the applicant pursuant to s. 7(1) of the Act. Thus, judicial review of the restriction order, which emanated from a detention order against the applicant, both issued by the first respondent, was allowed. The applicant was released from further restriction and set free forthwith. (paras 24 & 29)

Case(s) referred to:

Cemerlang Land Sdn Bhd v. Ali Saat & Anor And Other Appeals [2017] 9 CLJ 664 CA ***(refd)***

Dhinesh Tanaphll v. Lembaga Pencegahan Jenayah & Ors [2022] 5 CLJ 1 FC ***(foll)***

Lei Meng v. Inspektor Wayandiana Abdullah & Ors And Other Appeals [2022] 3 CLJ 177 FC ***(foll)***

Overseas Investment Pte Ltd v. Anthony William O' Brien & Anor [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82 HC ***(refd)***

Selva Vinayagam Sures v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2021] 2 CLJ 29 FC ***(foll)***

TMDN Malaysia & Anor v. Awang Sari Lasikan (BA-44-296-09-2020) (Unreported) ***(foll)***

Legislation referred to:

Criminal Procedure Code, ss. 365(a)(ii), 366, 374

Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 6(1), 7(1), 11C, 14

Dangerous Drugs Act 1952, s. 15(1)(a)

Federal Constitution, arts. 5(1), 149(1), 151(1)(a)

For the applicant - S Singaravadivel Singaram; M/s Liew, Tan & Julia

For the respondents - Nur Syafiqah Mohamed Yusoff; FC

Reported by Suhainah Wahiduddin

JUDGMENT

Muniandy Kannyappan J:

Background Facts And Competency Of This Appeal

[1] Applicant Kumar Selvaraj had applied for judicial review of a restriction order issued against him on 23 April 2021 pursuant to s. 7(1) of Dangerous Drugs (Special Preventive Measures) Act 1985 (Act 316). (See: exh. KS2 to affidavit in support of application for judicial review by applicant).

[2] The restriction order emanates from a detention order issued against him on 27 August 2020 by the first respondent, Deputy Minister of Home Affairs (DM), pursuant to s. 6(1) of Act 316. (See: exh. KS1 to affidavit in support of application for judicial review by applicant). Thus, both the detention and restriction order cannot be truncated, but viewed together as it is successive. Both the orders had affected personal liberty and freedom of the applicant. In view of that too, the detention order issued against him is a live issue. (See decision of the apex court in the case of *Lei Meng v. Inspektor Wayandiana Abdullah & Ors And Other Appeals* [2022] 3 CLJ 177)

[3] In terms of the law, the applicant *via* his counsel has alleged that his detention has been unlawful, as it is not in accord with the pith and substance of Act 316 and our supreme law, art. 149 of the Federal Constitution (FC).

[4] This court had allowed the application for judicial review of the restriction order, which in actual fact stemmed from the detention order issued by DM against him. By virtue of the restriction order, he is restricted to stay and live at Mukim Pengerang, Kota Tinggi, with a myriad of conditions. When the application was allowed, this court has in effect allowed the applicant to be freed from further restriction and supervision by the respondents. Thus, for all intents and purposes, he is set free, which in law tantamount to an issuance of a writ of *habeas corpus*. The applicant who was not present in court during the entire judicial review proceeding, is now set free, by order of this court.

[5] As outcome of the judicial review proceeding is to set the applicant free unconditionally, from further restriction, an appeal has to lie only to the Federal Court against any decision or direction of this court, pursuant to s. 374 of the Criminal Procedure Code (CPC/Act 593) read together with s. 365(a)(ii) and s. 366 of the CPC. A writ of *habeas corpus* is considered as a means of judicial review, reviewing the decision made by the first respondent. In that respect, competency of this appeal to the Court of Appeal is questionable. Moreover, broadly speaking, s. 11C of Act 316, allows the applicant to apply for judicial review if he regards or finds himself to have been unlawfully detained or even restricted. As discussed in the subsequent paragraphs, the applicant was detained first, but later the said order was

suspended and then substituted with a restriction order, also by the DM, the first respondent. Hence, the applicant is entitled to apply for judicial review of that act against him by the first respondent at once pursuant to s. 11C of Act 316 and if allowed, a *certiorari* would lie to quash the decision of the first respondent followed by a direction by this court for his immediate release from restriction. His release would also in effect be an order for a writ of *habeas corpus*, which would operate in his favour. In that respect, what lies ahead for him is an unconditional release without any more restriction on his freedom and liberty. Be that as it is, the following is reasoning by this court to have allowed judicial review of the restriction order against the applicant.

The Detention Order And Application Of The Case Of *Selva Vinavagam*

[6] As the detention order followed by an order of restriction with conditions, is the pivotal scenario in the case of applicant, an issue is raised as to lawfulness of the detention order made against the applicant. It is contended that the detention which is premised on a set of allegations of facts does not correspond with the supreme law in art. 149 of the FC, whereby the applicant may be detained only if he is involved or connected with a substantial body of persons. The preamble to Act 316 in turn ties up with art. 149 of the FC. Both Act 316 which is made pursuant to art. 149 of the FC has to be complied with in its strictest sense, any disregard or contravention of it, will lead to the detention of a detainee to be unlawful, and he has to be set free, at once unconditionally. This is presently the rule of law, as decided by the apex court in the case of *Selva Vinayagam Sures v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2021] 2 CLJ 29 which I am bound by pursuant to the doctrine of *stare decisis*.

[7] To support judicial review of preventive detention by the respondents, the applicant in his affidavit has averred to many grounds, pointing to unlawfulness of the action taken against him. However, during hearing, his able counsel with all frankness and clarity, decided to proceed only with the ground relating specifically to the allegations of facts and reasons upon which the applicant has been detained. His primary contention is, the applicant is alleged only to have been involved alone in the alleged drugs trafficking activity and not with other individuals, for the activity to constitute involving a substantial body of persons. Thus, his lone involvement under the law pursuant to Act 316 read together with art. 149(1) of the FC, does not trigger preventive detention, including issuance of firstly a detention order, then suspended, followed by a restriction order pursuant to s. 7(1) of Act 316.

[8] Perusing the affidavits in opposition filed by respondents to resist application for judicial review by applicant, specifically by the first respondent, DM in encl. 16, it is apparent when issuing the said detention order he has categorically stated, the applicant was involved and connected

with a substantial body of persons when he carried out drugs trafficking activity. That may be so, but his averment in the sworn affidavit does not correlate with the allegations of facts against the applicant, premised on which he was detained.

[9] The allegations of fact emphatically verify the applicant's individual or personal involvement with drug trafficking activity and not with a substantial body of persons. His lone involvement is fortified by the use of the pronoun "kamu" which only refers to the applicant himself and not with a body of persons.

[10] Federal Counsel, when advancing her submission for the respondents, had invited this court to distinguish the facts of present case of applicant with that of the case decided by the apex court in *Selva Vinayagam*. This I found to be inappropriate, firstly because decision of the apex court which touches on the root of any detention order made against a detainee applies with full force to all other cases, if it is merited, like to the present case of applicant. Secondly, each case of detention is distinct, like case of applicant, hence allegations of facts made against him has to be perused independently, if it applies to the applicant but not to be compared or contrasted with another case of detention, like in *Selva Vinayagam*. Thus, combing through the allegations of facts against the applicant, it is patently clear, the applicant had been alleged to have been involved in drugs trafficking activity alone by buying and selling drugs as well as obtaining only the services of one other individual as his conduit to sell the said drugs. He was not out there to embark on a drugs trafficking enterprise or syndicate with a substantial body of persons. By merely, obtaining services of another accomplice, does not render his involvement with a substantial body of persons, as envisaged under Act 316 read together with art. 149(1) of the FC. The fact remains, to reiterate, he is alleged only to be involved alone and individually in the drugs trafficking activity, hence the use of "kamu" and not "dengan sekumpulan orang lain yang terlibat dalam pengedaran dadah". This court shall not pay lip service to the allegations of facts furnished to the applicant. It is foundation of the case against the applicant before he was detained under Act 316. It stands with full force, akin to a charge preferred against an accused in a criminal trial. It is with that charge; the accused is guided to advance his defence by calling the requisite witnesses to establish his innocence. Likewise, with the allegations of facts, the applicant cum detainee in the present case would know for sure why he had been detained and if his detention is lawful or unlawful pursuant to Act 316 as well as art. 149 of the FC. It has to be emphasised that the allegations of facts premised on which the applicant has been detained, is foundation for his preventive detention. As the said allegations are akin to a charge in an open court criminal trial, it has got to be specific, certain and precise. This is fortified by art. 151(1)(a) of the FC, which allows him an unfettered right to be heard against his detention.

[11] In that regard, the case of *Selva Vinayagam* sets the pace of applicable law. Essentially, the apex court in that case had decided on legality of a detention order, if it had not been issued with strict compliance with Act 316, specifically in accord with its preamble which has to be read harmoniously with our Supreme Law, *to wit*, art. 149 of the FC, then the said order and subsequent detention of a detainee would be rendered unlawful and a writ of *habeas corpus* would be issued, for him to be set at liberty forthwith.

[12] In that context, it is also decided by our apex court, that this court has to consider if the Deputy Minister had before issued detention order against applicant considered if the applicant was carrying out drug trafficking activities alone or in association with a substantial body of persons. The detention is only justified and lawful if the applicant is alleged to have been acting in concert or in association with a substantial body of persons. Thus, this court has to subject the record available to curial scrutiny to see if such allegation is present so that it syncs with Act 316 and art. 149 of the FC.

[13] It was also decided in the case of *Selva Vinayagam* that:

> ... It is clear that the power under subsection 6(1) of Act 316 may only be exercised if the following three key ingredients are set out in the grounds of detention order and allegations of fact. **One**, that the activity which has been taken or is being threatened by a substantial body of persons relates to or involves the trafficking in dangerous drugs. **Two**, that the detenu is a member of a substantial body of persons. **Three**, that the Minister is satisfied that it is necessary in the interest of public order that the detenu be subject to preventive detention.
>
> (emphasis added)

Further, our apex court rendered its advice which shall be followed that:

> ... courts must be vigilant in individual cases to ensure that the Executive acts within the law and does not encroach unnecessarily into the fundamental liberties of the person. We have scrutinised the grounds of the detention order, the allegations of fact and the Deputy Minister's affidavit. We agree with counsel for the appellant that the only allegation is that the appellant is acting alone. There is no allegation that the appellant's activities were being carried out in association with or involved a substantial body of persons.

Finally, the Federal Court decided:

> ... We are, therefore, constrained to hold that the fact of the appellant acting alone cannot be deemed to fall within the ambit and scope of scrutiny under Act 316; which scope is explicitly confined to a substantial body of persons. The omission in setting out all the three vital ingredients indicates that the mind of the Deputy Minister was really not applied to the question of the preventive detention of the appellant in this case. There was a failure to comply strictly with the letter of the rule of law. Consequently, the exercise of power by the Deputy Minister in the circumstances of the case is bad in law.

For the foregoing reasons, we hold that the detention order is *ultra vires* art. 149 of the FC and Act 316. It follows that the detention order is a nullity and is hereby set aside. A writ of *habeas corpus* is hereby issued and the appellant is set at liberty forthwith.

Illegality

[14] Any other form of argument to stray from the allegations of facts as well as the decision of our apex court in the case of *Selva Vinayagam* is negated by the narrative which had taken place in the case of applicant. It is an uncontroverted fact, that he was initially arrested for self-administration of drugs, and without his knowledge he was asked to sign on certain instruments given to him, which later he realised caused his detention under Act 316 for a period of 60 days. Thus, the applicant's arrest was for self-administration of drugs, when he was hauled up for a urine test to confirm self-administration of drugs. Magically, the said arrest pursuant to s. 15(1)(a) of the Dangerous Drugs Act 1952 (DDA/Act 234) culminated into a detention under Act 316. Then, came about the allegations of facts against him, stating he was involved in drugs trafficking activity, not with a body of persons but alone. His case did not rest there, but after his legal representation to the advisory board for hearing, the detention order in its entirety was suspended and instead a restriction order followed against him with a myriad of conditions, to which he had claimed not only his liberty was seriously affected but he could not carry out any gainful activity to sustain his livelihood at the restricted place at Mukim Pengerang, Kota Tinggi. Rightly so, his representation was allowed, in full reliance on the wordings of the allegations of facts furnished to the applicant by the first respondent. It is obvious, the applicant's involvement with drugs trafficking activity is by himself only, without any support or assistance from a substantial body of persons, in order to justify his detention under Act 316. Hence, suspension of the detention order, later served with a restriction order, attendant to it, a myriad of supervision requirements pursuant to s. 7(1) of Act 316. Hence, in entirety it is clear as crystal that his personal freedom and liberty has been deprived, thus transgressing art. 5(1) of the FC. That *per se*, renders the entire process of arrest, remand, detention, suspension and restriction, illegal.

[15] Illegality, since time immemorial is an established ground for judicial review of enforcement action embarked by the respondents, on to the applicant pursuant to Act 316. If the act has caused untold effect on his liberty, thus transgressing art. 5(1) of the FC, it would render the entire process of criminal investigation, including his arrest, remand, detention and subsequent suspension of it, and restriction to live in a specific district, *void ab initio*. In this respect, it would be judicious and appropriate to refer to the case of our apex court in *Lei Meng*, referred to above, which had decided:

> The process of detention of the appellants must be looked at as a whole because the entire process is inter-related if one of the processes is tainted, the entire process is questionable requiring us to look into it ... viewed in this way and giving art. 5(2) FC its fullest effect, the fact that the detenu was subsequent to the date of the filing of his application, preventively detained ... under some other provision, ... does not vitiate his right to judicial scrutiny over the legality of his initial detention.

[16] It is a fact, when applicant was served with a detention order pursuant to s. 6(1) of Act 316, he was alleged to have indulged in self-administration of drugs, hence the need to test his urine in order to determine if it is true. This material fact has not been denied by the respondents, in their affidavits filed, thus it is deemed to be admitted, by virtue of the principles of law on reception of affidavit evidence. (See: *Overseas Investment Pte Ltd v. Anthony William O' Brien & Anor* [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82; [1988] 3 MLJ 332). Further, it is also a fact that his arrest for self-administration of drugs has in fact metamorphosed into his involvement with drugs trafficking activity.

[17] *Albeit* the allegations of fact against applicant, the Deputy Minister of Home Affairs (DM) who had issued the detention order against him, has in his affidavit resisting the application for judicial review, deposed that the applicant was not alone when he committed the drug trafficking activities, but associated with other individuals, forming a substantial body of persons. Essentially, he states that the crime committed by him is syndicated. He went on further to say; such involvement of applicant satisfies requirement under art. 149 of the FC and Act 316.

[18] Justification for his finding is purportedly premised on scrutiny and consideration of the investigation and inquiry report prepared and forwarded to him respectively by investigation officer of the case as well as inquiry officer. Despite reference and adherence to the said reports, it was not produced as exhibits. This is simply because, it is confidential and its disclosure is not permitted under s. 14 of Act 316. But for the sake of fairness, transparency and accountability, it would be appropriate for those reports to be produced, as it forms basis for his contemporaneous consideration before arriving at a finding against the applicant. It cannot be further emphasised, that the applicant has been detained without an open court trial, thus it is material and relevant for him to know what is in fact the case against him, so that he could advance his refutation or defence at the advisory board proceeding as well as in this proceeding for judicial review. To comply with s. 14 of Act 316 which renders non-disclosure of such documents, the DM could have redacted the confidential parts in those reports, which he considers to be against national interest, from being revealed but disclose parts of it which supports his finding, that the applicant has been involved with acts of trafficking dangerous drugs by associating or syndicating himself with a substantial body of persons. In any event, he has

deposed to the effect that the applicant was not acting alone but, in a syndicate, which to a large extent is disclosure of the content of the said reports. Now with the decision of the apex court in *Selva Vinayagam*, it is a legal requirement for him to make the relevant disclosure, thus not having to breach s. 14 of Act 316. At this juncture, by analogy, what comes to my mind is the minutes of a unanimous decision by the apex court on 1 October 2021 in the case of *Dhinesh Tanaphll v. Lembaga Pencegahan Jenayah & Ors* [2022] 5 CLJ 1. Her Ladyships Nallini Pathmanathan FCJ; Rhodzariah Bujang FCJ and His Lordship Harminder Singh Dhaliwal FCJ, decided the following:

> (ii) On the refusal by the Board's Chairman to call the Appellant's witness, Mathanraj which amounts to a breach of natural justice and a procedural irregularity. As is trite it is incumbent upon the Respondent to prove compliance with the law. As such it would have been simple matter for the Respondent to produce the minutes of the Board of Inquiry which would have provided a contemporaneous note of what transpired. That would have resolved the conflicting accounts of the parties. The relevant confidential matters relating to security could have been redacted or held in camera as been stated in other case law.

[19] Flowing from above, it is settled and trite law that in a *habeas corpus* proceeding, burden of proof is on the respondents to demonstrate to this court that detention of applicant for the alleged drug trafficking activity is lawful. Pursuant to s. 366 of the Criminal Procedure Code (CPC; Act 593), the applicant need only to show that he has been illegally or improperly detained in custody with the object of satisfying this court that there is probable ground for supposing that he is detained against his will and without just cause under Act 316, read together with art. 149 of the FC. Concomitant with that is s. 11C of Act 316, which renders assistance to the applicant, by allowing judicial review by this court of his detention order, if there is non-compliance of a procedural requirement under the law.

[20] Hence, it is salient for the allegations of fact and reasons for detention of the applicant, upon which detention order was issued to sync and correlate with the finding by DM as deposed in his affidavit. His finding that applicant is in fact involved in drug trafficking activity with a substantial body of persons is unsupported by the said allegations of fact. Question that arises is, why content of the allegations of fact is at variance with finding by the DM who had issued the detention order against applicant? Submission by Federal Counsel appearing for respondents does not support their case either. It is submitted the finding by DM in his affidavit supplements the allegations of fact made against the applicant. That shall not be the state of law, as the allegations of fact which is key to the detention order against the applicant is at variance with the finding by DM, rendering it to be an afterthought to suit and scuttle the representation made by the applicant to this court *via* his

application for judicial review that the entire process of preventive detention is unlawful, without just cause and unsupported by the legal provisions in Act 316 and art. 149 of the FC.

[21] It can safely be concluded that in order of time, the allegations of facts prevail over finding of the DM in his affidavit. The allegations of fact were served on the applicant much earlier in time, then came the finding by DM in his affidavit, solely to resist the application by applicant for judicial review. It is settled criminal jurisprudence, if there are two set of facts constituting background to the detention order against applicant, one for and another against him, this court is without an alternative but to adhere to the former. Such inference is fortified by the apparent fact that liberty of the applicant is in jeopardy. Ensuing from that, the respondents are not able to demonstrate to this court that the applicant has been lawfully detained pursuant to Act 316, promulgated under art. 149 of the FC. Non-production of the reports referred to by DM, is at the behest of respondents. If produced, the applicant would be able to refute it *vide* an affidavit in reply, fortifying his right to be heard, and also in sync with his right to judicial review pursuant to s. 11C of Act 316. If the same matter is to be tried in open court, access to such reports would be possible *via* cross-examination of the DM who had deposed an affidavit by referring to it, followed by the investigation officer and inquiry officer, as authors of the requisite reports and finally the court as the ultimate arbiter, would deliberate and decide on the truth.

[22] It is crystal clear that the law demands, information as to involvement of the applicant, either alone or with a substantial body of persons when carrying out the drug trafficking activity has to be furnished to him with certainty, clarity and preciseness. It shall not be guesswork, surmise or conjecture. There shall also not be incongruence between allegations of fact and finding by the DM as deposed in his affidavit, as both are against the applicant, and the DM is the constant factor, as he issued the detention order against the applicant.

The Law On Judicial Review

[23] In deciding to allow application for judicial review by the applicant, I am guided by the illuminating decision of the Court of Appeal in the case of *Cemerlang Land Sdn Bhd v. Ali Saat & Anor And Other Appeals* [2017] 9 CLJ 664; [2018] 1 MLJ 331, which is also in a similar realm of law. Her Ladyship Hasnah Hashim JCA (now FCJ) had encapsulated the law pertaining judicial review and decided:

> [16] The Federal Court case of *R Rama Chandran v Industrial Court of Malaysia & Anor* (1997) 1 MLJ 145 and the case of *Ranjit Kaur Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* (2010) 6 MLJ 1; held that the decision of the inferior tribunal may be reviewed on the grounds of illegality, irrationality and possibly proportionality and the **courts are permitted to scrutinise such decisions not only for the process but also for substance**.

[17] It is trite law that courts should not reverse an award of a tribunal unless there is proven a clear jurisdictional error. *A jurisdictional error can arise when a tribunal does not act within the proper scope of its statutory function such as whether it has acted without sufficient evidence or on no evidence, or has misconstrued the law on an issue on which its decision is founded*. (*Re: Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers' Union* (1995) 2 MLJ 317).

[18] As Gopal Sri Ram JCA (as he then was) said in *Datuk Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin* (1997) 2 MLJ 17 at p 32:

> ... where the exercise of a decision is challenged on grounds of vires that is illegality or unreasonableness, the court is not confined merely to the decision- making process, but may examine the merits of the decision itself.

[19] We are further guided by what was stated in the Federal Court case of *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd And Another Appeal* (1995) 2 MLJ 753 at p 757:

> In exercising judicial review, the High Court was obliged not to interfere with the findings of the Industrial Court unless they were found to be unreasonable, in the sense that no reasonable man or body of men could reasonably come to the conclusion that it did, or that the decision of the Industrial Court looked at objectively, are so devoid of any plausible justification that no reasonable person or body of persons could have reached then (see Lord Denning's judgment in *Griffiths (Inspector of Taxes) v. JP Harrison (Watford) Ltd* (1962) 1 All ER 909 at p. 916, and judgment of Lord Diplock in *Bromley London Borough Council v. Greater London Council and Anor* (1983) 1 AC 768 at p. 821.

[20] It is trite law that *certiorari* will lie to quash a decision made by a public authority in excess or abuse of jurisdiction or contrary to the rules of natural justice or where there is an error of law on the face of the decision of the public authority. *For a decision to be quashed on judicial review, there must first be a decision by a decision maker, and the said decision affected the aggrieved party by either altering the rights or obligations or depriving him of the benefits which he has been permitted to enjoy*.

[21] The court must review the decision in order to determine the basis of a material mistake of fact on the part of the person who made the decision or where the decision was arrived at arbitrarily, capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper process, or where the functionary misconceived the nature of the discretion conferred upon him and took into consideration irrelevant issues or ignored relevant ones.

...

(emphasis added)

A **Findings And Conclusion**

[24] Ensuing from the above proposition the following are apparent:

(i) For a decision to be quashed on judicial review, there must first be a decision by a decision maker, in the present case by Deputy Minister, the first respondent. The said decision had affected the applicant, whose fundamental liberty pursuant to art. 5(1) of the FC is altered. Because of the detention, suspension of it and followed by a restriction order against him, his inalienable rights which are supposed to be safeguarded, are in fact transgressed.

(ii) This court must review the said decision in order to determine the basis of a material mistake of fact on the part of DM who made the decision as a result of unwarranted adherence that applicant was involved with a substantial body of persons when he carried out his drugs trafficking activity. By doing so, he took into consideration irrelevant issues but ignored relevant one, which is, that he is only involved alone in that activity.

(iii) This court is permitted to scrutinise decision made by the first respondent not only for the process but also for substance.

(iv) A jurisdictional error has arisen when the first respondent did not act within the proper scope of his statutory function under Act 316 read together with our Supreme Law in art. 149 of the FC.

(v) Premised on the allegations of facts furnished to the applicant, the first respondent has also acted without evidence, when he had linked the applicant with a substantial body of persons in the drugs trafficking activity. His act was further compounded by issuance of the detention order pursuant to s. 6(1) of Act 316, followed by its suspension and a restriction order under s. 7(1) of Act 316. By doing so, he has misconstrued the law on preventive detention under Act 316 read together with art. 149 of the FC.

(vi) Since his decision is challenged on grounds of *vires* that is illegality, this court is not confined merely to the decision-making process but may examine merits of the decision itself. Hence, the curial scrutiny of the allegations of facts made against the applicant.

(vii) It is trite law, *certiorari* will lie to quash a decision made by the first respondent in excess or abuse of jurisdiction or contrary to the rules of natural justice or where there is an error of law on the face of his decision. By not complying with the pith and substance of the preamble to Act 316 which has to be read with art. 149(1) of the FC, the detention order issued against the applicant is null and void. Thus, stemming from its root which is illegal, *vires* of its illegality follows, when the said detention order was suspended and a restriction order had been issued against the applicant pursuant to s. 7(1) of Act 316.

[25] It is disturbing, the allegations of facts against applicant reads the applicant was involved in drugs trafficking activity, with no mention of his involvement with a substantial body of persons. There is only reference to his involvement with another accomplice to his crime, when he had asked him to sell drugs. That accomplice is only another individual. On that score, viewing it from the offence of trafficking under the Dangerous Drugs Act 1952 (DDA/Act 234), he could have been individually charged for that offence, be it for possession or trafficking, subject to the weight of drugs.

[26] But unexpectedly, like a bolt out of the blue, the investigation officer, inquiry officer and first respondent, the Deputy Minister, in their affidavit, have deposed under oath, that applicant was found to be involved in drugs trafficking activity with a large group of persons, when they had positively said, "dengan sekumpulan besar orang dalam menjalankan aktiviti pengedaran dadah berbahaya ...". From where the large group of persons had emerged, is unanswered. It is also not stated so in the allegations of facts furnished to the applicant. To reiterate, the allegations of facts, came about much earlier in time compared to the averments in the affidavits filed in opposition to the application for judicial review by the applicant. In that respect, their averments in the affidavit, are an afterthought which smacks on illegality.

[27] In the upshot, pursuant to s. 11C of Act 316, there has been non-compliance with the pith and substance of Act 316 as well as our supreme law in art. 149 of the FC. Recent decisions of our apex court iterating strict compliance with procedural requirement under the Federal Constitution as well as Act 316, needs no emphasis. In this respect, the latest *dictum* of our Chief Justice on 7 December 2021 in the case of *TMDN Malaysia & Anor v. Awang Sari Lasikan* (BA-44-296-09-2020) resonates. It was decided, *inter alia*:

> ... The object of the statute is to preventively detain a person but only if it is the case that there is sufficient reason to do so under the preventive detention promulgated under art. 149. And that in turn is because it adversely affects, or negates the liberty of a person ...
>
> If the construction that mere procedural review is the only basis on which to examine these ministerial orders, then extremely strict compliance is warranted ...

[28] In view of the foregoing, submission advanced by Federal Counsel is flawed. I am bound by the prevailing law adumbrated in the trilogy of cases *Selva Vinayagam*, *Dinesh Thanaphll* and *Awang Sari Lasikan* as well as *Lei Meng*. By virtue of the doctrine of *stare decisis*, this court being lowest in the hierarchy of superior courts in the country, is bound by the said decisions. So are the respondents. For the respondents to invite this court to distinguish

A the decision of the apex court from the present case of the applicant, when the material facts are the same, is in effect tantamount to ignoring the tenor, effect and scope of the judgment by the apex court, which is erroneous.

[29] Consequently, judicial review of the restriction order, which emanates from a detention order against the applicant, both issued by the first respondent, is allowed, and the applicant is released from further restriction and set free forthwith.

[30] At time of hearing and decision, I was the Judicial Commissioner, High Court, Taiping.

C Applicant released unconditionally.

D

E

F

G

H

I